

HIGH COURT FACES PLEA ON WIRETAPS

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Justice Agency Expected to Ask Bench Today to Change Its Far-Reaching Ruling

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WASHINGTON, March 12—The Justice Department is expected to ask the Supreme Court tomorrow to change a far-reaching decision on eavesdropping.

The department believes that the decision would force the Government to abandon many prosecutions or else concede that it has been tapping the telephones of many foreign embassies here.

Justice Department officials were stunned by last Monday's Supreme Court ruling, which forces the Government to let any criminal defendant see all transcripts of conversations by him that have been picked up on illegal government listening devices, whether or not any information obtained is relevant.

Officials had assumed that at least two of the Justices—Byron R. White and Thurgood Marshall—would have known from their recent service in the Justice Department that the lines of a substantial number of embassies here have been illegally tapped for years, and that some are still being tapped.

Taps at Many Embassies

Because wiretapping of foreign embassies is common, many defendants in criminal cases have been overheard while calling to discuss visas and other routine matters. Under Monday's ruling, the Government would have to disclose the transcripts of the calls or drop the prosecutions.

Also, because many embassy taps are still in operation, one official said today that "all a defendant in a routine tax case—or any other Federal case—has to do now is telephone a few foreign embassies and we'll have to drop the case against him."

Under the Court's rules a

Continued on Page 28, Column 1

Continued From Page 1, Col. 2

losing party has 25 days within which to file a petition for rehearing. A Justice Department official said yesterday that the department rarely files petitions for rehearing because they are rarely granted.

The spokesman could not remember any case in which the Government had asked for a rehearing when it had lost by two votes.

All of the officials interviewed today assumed that the Government will sacrifice the convictions, if put to a choice, rather than disclose officially that it is tapping foreign embassies' lines. It was learned that some taps have been on the telephones of friendly and neutral powers, as well as Communist countries.

"Everybody knows that has been going on for years," one official said. "They do the same thing to our embassies in other countries. But I don't think we can afford to admit it."

It is understood that unless the Supreme Court agrees to change its ruling, the Justice Department could be forced to dismiss the convictions of Cassius Clay, the former heavyweight boxing champion who has been convicted of draft evasion, and the case of some or all of the group of four men, including Dr. Benjamin J. Spock and the Yale chaplain, William Sloane Coffin, who were convicted in Boston last year of conspiring to obstruct the Selective Service System.

Indictments Blocked

It has also been learned that several militant leaders, including the "Yippie" leader, Jerry Rubin, cannot be indicted as planned for violating the Federal antiriot laws during the disturbances at the Democratic National Convention in Chicago last August.

The Government has admitted in connection with a contempt of Congress case that it overheard Mr. Rubin on a "national security" device, and it is now known that others who would have been indicted have been overheard over devices that are too sensitive to disclose.

Justice Department officials are hoping to find a face-saving way for the Supreme Court to change its ruling to bar defendants from access to "national security" transcripts. Otherwise, they feel that pub-

lic displeasure against the Court could prompt Congressional moves to chastize the Court.

Department officials are especially embarrassed because they now assume that the Court apparently did not realize the problem raised by the embassy wiretaps when it issued its ruling.

Solicitor General Erwin N. Griswold personally argued the case before the Justices, but he could not explain the problem in open court or in briefs without embarrassing the Government.

It would have been considered a breach of propriety if he had privately informed the Justices of the case's pitfall, and it is now known that he did not attempt to do so.

Hint to High Court

However, Mr. Griswold filed a paper in an obscure Supreme Court case last Thursday that was an apparent attempt to hint to the Justices that embassy wiretapping was at the core of the matter.

The memorandum was filed in the case of Emmanuel Blaz Mrkonjic-Ruzic, a Yugoslav im-

migrant who has been found guilty of making false statements in an immigration proceeding.

In it Mr. Griswold noted that the Justice Department has "normally not sought to burden this Court with the task of reviewing the logs of overheard conversations. In this case, however, we believe that it would conserve judicial time if this Court were to review the one and a half line entry involved in this case to satisfy itself that the overheard conversation was not relevant to the instant prosecution."

It is understood that this brief transcript would have shown the Court that Mrkonjic-Ruzic was overheard making a routine telephone call to a Communist-bloc embassy—and that this would have altered the Justices to the over-all embassy wiretap problem.

Officials in the Solicitor General's office were uncertain today whether they would ask the Court to reconsider and reverse the same case that it decided last Monday, or if they should raise the same point immediate in another case.

It would be extremely awkward for the Court to reverse itself upon a rehearing of Monday's case, since the vote was 5 to 3 and at least two Justices would have to switch to arrive at a different result.

Justice White wrote the majority opinion, joined by Chief Justice Earl Warren and Justices William J. Brennan Jr., William O. Douglas and Potter Stewart.

The dissenters were Justices Hugo L. Black, Abe Fortas and John M. Harlan. Justice Marshall, who was involved in the wiretap controversy when he was Solicitor General, did not take part.

The present situation stems from the fact that although wiretapping has been a Federal crime since 1934, all Presidents since Franklin D. Roosevelt have authorized Federal intelligence agencies to use it in "national security" investigations.

In recent years the Supreme

Court has likewise held that "bugging"—the use of microphones hidden in suspects' premises—is also illegal, under the Fourth Amendment's prohibition against unreasonable searches and seizures.

The effect has been that wiretapping and bugging has been used to gather intelligence against spies and, in some instances, against racketeers.

Under the Supreme Court's rulings, evidence or leads obtained by means of these devices was not admissible in evidence. Thus it was rarely disclosed in trials that eavesdropping had taken place, and the extent of it was not generally known.

Furor Under Johnson

However, in 1965 a number of bugs and taps by the Federal Bureau of Investigation were discovered. In the furor that resulted, President Johnson ordered an end to all

bugging and tapping except in national security investigations. Subsequently, the Justice Department adopted a policy of disclosing in court any instance in which a defendant had been overheard over one of these illegal devices.

To date this has been done in about 40 cases, and in all but a handful the Justice Department has explained that the overhearing was accidental and that the case at issue was not affected.

Cases of Convicted Spies

To prove this, the department would furnish the trial judge a copy of the transcripts of the conversations, and he would decide for himself whether the surveillance could arguably affect the defendant's right to a fair trial.

So far, in each case in which the Government has contended that the eavesdropping did not affect a case, the judge has

agreed after seeing the transcripts that it did not.

On Monday the Supreme Court ruled on the cases of two convicted spies who had been overheard by the Government by its own admission.

They contended that they and their lawyers should be permitted to see the transcripts, and that they should not have to be satisfied with the assurance of the Government or of a Federal judge that nothing in them was arguably relevant to their trials.

Mr. Griswold insisted that the prior procedure was adequate. In any event, he urged, the Supreme Court should make a special exception for conversations that were picked up on "national security" wiretaps to prevent disclosure of Federal eavesdropping activities.

The Court ruled that any defendant who has been overheard over an illegal device should be allowed to see the transcripts.

transcript, and that no exception should be made for national security taps.

Justice White's opinion said that the trial judge could order the defendant and his lawyer not to disclose the contents. However, one official explained that some defense lawyers would probably leak the contents to the press to discourage the Justice Department from bringing further prosecutions.

Unanswered Question

Monday's case did not discuss whether the Justice Department would have to make disclosures in the future if it uses the legal eavesdrop authority that was granted by Congress last June. That law permits Federal officials to eavesdrop, with court approval, in national security and in some criminal cases.

However, some experts believe that many "national security" devices will still be operated without court authorization.